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No. 90-339

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE CELOTEX CORPORATION,

Petitioner,

—v.—

JOHN E. JOHNSON, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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I. THE SECOND CIRCUIT MAJORITY MISAPPREHENDED AND MISAPPLIED CONTROLLING STATE LAW

Respondents' argument that "it is nothing short of specious" and "disingenuous at best" for petitioner to claim that the case at bar presents an issue of "controlling state law,"[1] fails to acknowledge that Circuit Judge Mahoney dissented on the ground that the majority failed to follow the applicable state law. See Petition at 10-11. [Hereinafter "Pet. at ____"]. Moreover, respondent does not seem to understand that raising the Second Circuit's "misapprehension and misapplication" of the controlling New York law is not synonymous with asserting a misstatement of that law. Celotex's petition does not claim that the district court or the Second Circuit majority misstated the New York evidentiary standard as permitting imposition of punitive damages for merely negligent—rather than reckless—conduct by a defendant. Pet. at 8. Rather, petitioner maintains that although the Second Circuit majority was correct in stating that a showing of at least "wanton or reckless" conduct is required for imposition of punitive damages, it did not understand (*i.e*, misapprehended) and correctly apply the New York standard fully described in the applicable Second Circuit precedent, *Roginsky v. Richardson-Merrell, Inc.*[2] If the majority understood and correctly applied the New York standard, it would not have sustained an award of punitive damages against Celotex based upon a recital of evidence irrelevant to the punitive damages issue before it, *i.e*, evidence which did not concern Celotex's actual knowledge between 1942 and 1945 of the risks its finished asbestos product posed to "bystanders" like plaintiff Johnson.[3]

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1 See Respondents' Brief in Opposition at 13; 9. [Hereinafter cited as "Opp. at ____"]. See also Opp. at 1, 8 and 19.

2 378 F.2d 832 (2d Cir. 1967). See Pet. at 8-15. One might, however, say that the majority did not *adequately* state the New York standard since its opinion, unlike that of Judge Mahoney, did not note that the "reckless" conduct necessary to sustain an award of punitive damages under New York law is considerably more egregious than the type of conduct which the common law would characterize with that term. See Pet. at 10-11 & nn.28 & 29; at 13 n.33.

3 See Point II *infra*. See also Pet. at 13-15; Judge Mahoney's opinion at Pet. App. 24a-26a and 51a-52a.

Respondents' suggestion that New York law permits imposition of punitive damages for grossly negligent conduct is not supported by the decisions they cite.[4]

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4 Apparently reluctant to state the proposition positively, "[r]espondents do not concede that gross negligence alone is an insufficient basis for punitive damages, as there are, indeed, New York authorities to this effect." See Opp. at 13, n.7. The two cases respondents cite, however, do not support that proposition.

Soucy v. Greyhound Corp., 27 A.D.2d 112, 276 N.Y.S.2d 173 (N.Y. App. Div. 1967) involved an appeal from a trial court order granting plaintiffs-respondents leave to file an amended complaint to add an exemplary damages claim. "[The trial court] in granting leave to amend held that 'exemplary damages may be awarded in actions for personal injuries where the negligence is so gross and culpable *as to evince utter recklessness*. . . .' " *Id.*, 276 N.Y.S.2d at 175 (emphasis supplied). The *Soucy* court affirmed, stating: "We find no merit in appellant's contention that exemplary damages are not allowable in personal injury actions based on negligence if such negligence amounts to flagrant misconduct." *Id.* "Moreover, while *actual malice is a requisite to the allowance of punitive damages* such may be established not only by showing 'that the tort was committed to gratify some actual grudge or ill will . . . [but also] by showing *that it was committed recklessly or wantonly*. . . .' " *Id.*, 276 N.Y.S.2d at 175 (emphasis supplied) (quoting *Magagnos v. Brooklyn Heights R.R.*, 128 A.D. 182, 183, 112 N.Y.S. 637, 638 (N.Y. App. Div. 1908)).

In *Cleghorn v. New York Cen. & H. River R.R.*, 56 N.Y. 44 (1874), the court reversed a judgment in favor of plaintiff and granted a new trial on the ground that the trial court erred in failing to instruct the jury that it could not award exemplary damages against the defendant railroad for the acts of its switchman absent a finding that the railroad was "chargeable with gross misconduct." *Id.* at 47. "Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, *knowing that he was incompetent*, or, from bad habits, unfit for the position he occupied. *Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established.*" *Id.* at 47-48. "If a railroad company, for instance, *knowingly and wantonly* employs a drunken engineer, or switchman, or retains one *after knowledge of his habits is clearly brought home to the company* . . . and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages. . . ." *Id.* at 48 (emphasis supplied). Respondents might have been misled by the *Cleghorn* court's use of the phrase "gross negligence" rather than "gross misconduct" in a brief passage holding "competent" on the punitive damages issue, evidence that the switchman "was a man of intemperate habits, which were known by the agent of the [railroad], having the power to employ and discharge him and other subordinates." *Id.* at 46-47. "[T]he evidence was com-

Much of respondents' argument goes to the proposition that since petitioner "concedes" that the trial court correctly charged the jury regarding imposition of punitive damages, the punitive award at bar is unassailable. See, e.g., Opp. at 8-9; 13 n.7. Respondents fail to understand petitioner's basic argument that Celotex was entitled to have the Second Circuit review the jury's verdict through the proper application of the controlling New York standard. The mere fact that the district court, and even the Second Circuit, correctly stated that standard does not prove that the punitive award at bar is supported by legally sufficient evidence. See Pet. at 8-19.

A. Review of the Second Circuit's Published Opinion Will Be Of Precedential Value

As a consequence of their erroneous argument that the case at bar involves no issue of controlling state law, respondents maintain that review by this Court of the opinion below will be of "absolutely no precedential value." Opp. at 19. Since the "corrected" majority opinion below has been published, 899 F.2d 1281, its misapprehension and misapplication of New York punitive damages and state of the art law will misguide district courts currently adjudicating a tremendous number of actions in which punitive damages have been demanded. See Pet. App. 3a-4a, 30a-31a. Moreover, it will serve as an erroneous precedent as to the consolidation issue. See Pet. at 19-24; Point III *infra*.

Even if the opinion below had not been published, action by this Court short of plenary consideration is warranted as an exercise of this Court's supervisory powers to correct a seriously and undoubtedly erroneous decision which the Second Circuit refused to address in a forthright manner, let alone correct.[5] The decision below does not present an historic constitutional issue, but, given its patently erroneous nature, neither will it require a substantial amount of this

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petent upon the question of gross negligence on the part of the defendant in employing or continuing the employment of a subordinate known to be unfit for his position. . . ." *Id.* at 47. That passage, however, does indicate that the defendant's actual knowledge was required. See Pet. at 10.

5 See Pet. at 15 & n.37; 25. See also Pet. at 6-7; 9-15.

Court's valuable time to evaluate and correct. Petitioner respectfully maintains that the Second Circuit majority's adjudication of the case at bar falls far below the standard which this Court should require of a United States court of appeals. See Rule 10.1(a)

II. THE SECOND CIRCUIT MAJORITY DID NOT CONSIDER CELOTEX'S ACTUAL KNOWLEDGE IN SUSTAINING THE PUNITIVE AWARD AT BAR

Respondents accuse petitioner of "purport[ing] to read the circuit judges' minds" in asserting that the Second Circuit majority 'did not consider what Celotex actually knew' in reviewing the award of punitive damages. Opp. at 16 (quoting Pet. at 13). Since Celotex did not wish to engage in that practice, its petition addresses the language used in the majority opinion—language which the majority twice approved. See Pet. at 14 n.34. That language does not indicate that the majority reviewed the award with respect to Celotex's actual knowledge at the time of plaintiff Johnson's employment of the risks its finished, hardbound asbestos products posed to shipyard workers experiencing bystander exposure. Rather, the majority, erroneously applying a negligence standard, focused upon what Celotex "should have known" based upon what others knew, "suspected," or "considered to be probable." See Pet. at 13-14; 11-12. Moreover, the punitive damages proofs mentioned in the majority opinion pertain to workers in "asbestos processing plants" who had "direct and sustained exposure to high concentration levels of asbestos fibers," not to "bystanders" like Johnson who did not personally use asbestos products and was exposed to lower concentration levels of asbestos fibers. See Pet. at 14-15. The only evidence respondents cite in support of their argument that the record supports an award of punitive damages in favor of shipyard workers like Mr. Johnson rather than just "plantworkers" is inapposite.[6]

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6 See Opp. at 17-18; 5 n.6, par. 2 (citing Jt. App. 2625, 2634). The paper cited, Brown, *Industrial Hygiene and the Navy in National Defense*, (presented at 5th Ann. Meeting of the Air Hygiene Foundation of Am., Inc., Nov. 13, 1940), concerns workers with direct exposure to asbestos: "Asbes-

Respondents, on the other hand seem to engage in mind-reading in assuming that in making "explicit reference to 'other evidence presented' as further basis for sustaining the verdict," the Second Circuit majority "[u]ndoubtedly" must have been referring to "testimony regarding Celotex's actual knowledge of the hazards of its product."[7]

It is highly unlikely that a court applying the correct legal standard for the imposition of punitive damages would recount at some length evidence irrelevant to the question before it, see Pet. at 13-15, and then refer to the relevant proofs with the phrase "other evidence presented." Contrary to respondents' assertions, the petition does not advance "the absurd view that . . . [the Second Circuit] was required to list and describe every single shred of proof that tended to support the verdict." Opp. at 16. Rather, petitioner maintains that the fact that the majority discussed only evidence irrelevant to the punitive damages issue Celotex raised supports the conclusion that the majority misapprehended and misapplied the controlling New York law. See Pet. at 8-9, 13-15. A court which understood and knew how to apply the controlling legal principle certainly need not have discussed "every single shred of proof," but it would have referred—even in broad terms—to some relevant evidence. This is especially true if one accepts respondents' proposition that one should presume Judge Carman's familiarity with the entire record. Opp. at 15, lines 18-20. According dissenting Circuit Judge Mahoney the same presumption of familiarity with the record, one must note that jurist's express statement that the "record contains *no* evidence" to support plaintiff Johnson's

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tosis: This is a potential occupational disease hazard . . . among workers engaged in *the manufacture* of asbestos insulating covers for flanges, valves and . . . turbines. I recently conducted a medical survey of the workers of *the pipe insulating shop* of the New York Navy Yard, inclusive of roentgen studies. The maximum working period of exposure was [17] years. *No cases of asbestosis were found.*" *Id.* at 2634 (emphasis supplied). See also *id.* at 2633 (par. 1(b)) (regarding "makers of pipe insulating covers.") See Appendix 4 of "Petitioner's Lodging" submitted with this brief [hereinafter cited as "Pet. Lodg., app. _____"].

7 Opp. at 16. See also Opp. at 18 ("As the Second Circuit, no doubt, concluded in upholding the punitive damage award. . . .")

punitive award against Celotex. Pet. App. 25a; 52a (emphasis in original). See Pet. at 13-15 and 18.

A. The Ritterhoff Deposition

Respondents claim that the "other evidence" required to sustain the punitive award at bar appears in the deposition testimony of their medical expert Dr. Robert Ritterhoff. See, e.g., Opp. at 3-4. Continuing the shrill tone which characterized their efforts at trial,[8] respondents accuse petitioner of failing to reveal to this Court a "crucial fact" from that deposition which shows that petitioner's corporate predecessor had actual knowledge of "the dangers of its product" by 1944. See Opp. at 3-4; 9-10; 14 & nn.8 & 9; 15. Since respondents have not provided the document they cite, petitioner has lodged it with the Court[9] to show that it does not support respondents' contention and that it is in any event irrelevant to the case at bar.

Respondents cite to pages 25-47 of the deposition for the proposition that "the proofs soundly established that Carey had, indeed, actual and concrete knowledge of the deadly characteristics of its asbestos product before and during the time Mr. Johnson was exposed." Opp. at 3-4 & nn.5 & 6. Respondents state that Dr. Ritterhoff performed an autopsy on a Carey worker (Herbert Scobie) in 1944, "concluded that the man's death was due to asbestos" and specifically warned Carey, through an appropriate corporate official, of his findings." Opp. at 3-4. Contrary to respondents' assertions, it is not clear that Dr. Ritterhoff contacted any Philip Carey official "before or during" Mr. Johnson's 1942-45 employment at the Brooklyn Navy Yard.[10] Respondents' assertion that Dr.

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8 As recounted in part in the majority opinion below, respondents referred to defendants, their witnesses and attorneys as, *inter alia*: "liar[s]," "sleaze," "evil" and "vicious." Pet. App. 19a; 46a. The Second Circuit rejected defendants' arguments that those comments as well as the conduct of the district court judge warranted a new trial. Pet. App. 20a, 21a; 47a, 48a.

9 See Pet. Lodg., app. 1.

10 Although the autopsy referred to was performed on an unspecified date in 1944, Dr. Ritterhoff stated that he believes he did not speak to the

Ritterhoff informed "an appropriate corporate official" also finds no support in the record.[11] Moreover, Dr. Ritterhoff concluded that the subject's asbestosis alone could not have resulted in death.[12] Furthermore, since Dr. Ritterhoff's findings are based upon a worker employed for 25 years in an asbestos product manufacturing plant,[13] they are irrelevant to the case at bar since Mr. Johnson experienced only "bystander exposure" to finished asbestos products used by others. See Pet. at 14-15 & nn.35 & 36.

Even if the Ritterhoff deposition factually supported respondents' assertions, it would not justify imposition of punitive damages against petitioner in the case at bar. Estab-

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Carey official until after preparation or actual publication—in 1946—of an article reporting his findings. See Pet. Lodg., app. 1 at 37, lines 3-13 (Dr. Ritterhoff "would say" that he spoke to an unidentified man at Phillip (sic) Carey about the autopsy of Herbert Scobie "after everything was written up" or after that paper was published in the Jan., Mar. and May 1946 edition of the Am. J. of Pathology.) See Pet. Lodg., app. 1 at 57-69 (article is deposition exhibit no. 6); app. 2 (a more legible copy of the article). See also app. 1 at 37, lines 3-13; at 44, line 18 to 45, line 17 (wherein Dr. Ritterhoff states, *inter alia*, that he does not know whether he spoke to the Carey official within one year before or after publication of the article); at 45 (in response to a question Dr. Ritterhoff states that he "would guess" "it" [the visit or publication?] was within six months of the autopsy); at 58 (article marked "Received for publication May 9, 1945"); at 50 (December 23, 1944 letter referring to additional tests to be conducted before article is written).

11 In the deposition testimony cited by respondents, Dr. Ritterhoff states that he spoke with someone at a Phillip (sic) Carey office in Cincinnati, but he does not identify that person by name or title. See Pet. Lodg., app. 1 at 37; 38, lines 4-5 ("I don't know the man. I don't remember the name. I'm sure I was told the name, but I don't remember it), lines 15-16 ("He was a kindly gentleman, gray-haired. That's all I remember.")

12 Although Dr. Ritterhoff at first erroneously believed asbestosis was a significant, but not the primary, cause of Mr. Scobie's illness, following consultation with a more experienced pathologist who stressed an apparently viral disease also present in the subject, sarcoidosis, Dr. Ritterhoff concluded that the subject's asbestosis alone could not have resulted in death. See Pet. Lodg., app. 1 at 50; 52; 61-62 (pp. 499-500 of article). Dr. Ritterhoff's deposition testimony that he told "Carey" that Scobie's death was due to asbestosis, see *id.* at 37, is inexplicable given the material discussed above, and irrelevant given the date thereof. See n.10 *supra*.

13 See Pet. Lodg., app. 1 at 59, or app. 2 at 494.

lishing a defendant's actual knowledge of a specific risk to workers with direct and sustained asbestos exposure does not establish actual knowledge of a risk to bystander workers like Johnson who experienced much lower level exposure. Indeed, petitioner did not have even constructive knowledge of any risk to Johnson; the "state of the art" at the time of his employment (1942-45) indicated that he was not at risk. See Pet. at 18-19. Moreover, even in the mid-1960s the state of the art indicated that insulators—who personally used asbestos-containing products—were generally not at risk.[14]

B. The State of the Art Proofs

In addition to defending their punitive award on the basis of proofs like the Ritterhoff deposition supposedly within Celotex's "actual knowledge," respondents also refer to "state of the art proofs" which they maintain permit imposition of those damages. The medical studies cited in support of that argument, however, establish only constructive knowledge of risks unrelated to those at bar.[15] Indeed, respondents,

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14 See, e.g., the testimony of plaintiffs' expert Dr. David Ozonoff: In a "landmark" study published in 1965—20 years after respondent Johnson's last occupational exposure to asbestos—Dr. Irving Selikoff stated that insulators were generally exposed to no more than the Threshold Limit Value of 5 million asbestos particles per cubic foot of air [hereinafter "TLV of 5"] established by the American Conference of Governmental and Industrial Hygienists ("ACGIH"). Pet. Lodg., app. 3 at 1152-1155. Daily occupational exposure (8 hours a day, 40 hours per week) to airborne asbestos not exceeding the TLV of 5 was considered safe, *i.e*, workers were not expected to become sick from it during their careers. *Id.* at 1145-1146; 1150-1151 (reference to 1965 and 1953 studies). The ACGIH's TLV of 5 was the standard accepted by the federal and most state governments. *Id.* at 1147-48. [See also Jt. App. 2689-2696 at 2695 (U.S. Navy's standard for 1964)]. It remained the standard until the late 1960s or early 1970s. Pet. Lodg., app. 3 at 1146-1147.

15 See Opp. at 4-6 & n.6. The studies discussed at Jt. App. 1191-1192 and 1085 involved workers who, unlike "bystander" Johnson, personally worked with asbestos and experienced "high dose exposure." Respondents' reference to Jt. App. 2625-2634 is also inapposite. See discussion at n.6 *supra*. Jt. App. 1089-1090 concerns reports linking asbestosis and cancer in workers directly handling asbestos (e.g., pipe insulators). Mr. Johnson has neither asbestosis nor cancer. See *infra* n.19. Jt. App. 1304 also concerns cancer. Respondents' other appendix references are obviously too general to

quoting an irrelevant jury instruction, expressly argue contrary to New York law that petitioner could have been found reckless for failing to warn of "suspected" or "possibl[e]" risks unrelated to those at bar.[16] That argument, which confuses the standard for awarding compensatory damages with the more stringent standard for imposing punitive damages, tends to prove that both the punitive and compensatory awards at bar were improper.[17]

Like the Second Circuit majority, respondents erroneously assume that once a defendant knows of a single instance of harm caused by asbestos it has actual knowledge of all other "dangers of asbestos,"[18] even those not yet revealed through research performed by the medical, scientific and industrial community and, therefore, not within the "state of the art." As Judge Mahoney observed: "This is hardly the 'recklessness . . . close to criminality' which we described in *Roginsky* as the standard for awarding punitive damages under New York law." Pet. App. 52a.

III. THE CONSOLIDATION WAS MANIFESTLY PREJUDICIAL

In defending the consolidation for trial of the *Johnson* and *Higgins* cases, respondents depart from the facts of record but do not deny that their own expert described Mr. Johnson

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constitute proofs sufficient to sustain a punitive award against Celotex: 1114-1115 (long latency period); 1085-1088 (asbestos diseases of concern to British government); 1259, 1263-1269 (medical reports from U.S.P.H.S); 1301 (Dr. Becklake "has stature").

16 Opp. at 18-19 (quoting Jt. App. 2106). That portion of the jury charge discusses when a product should be deemed "defective" due to lack of an adequate warning. See Pet. Lodg., app. 4 at 2103-2106.

17 Since the "state of the art" for 1942-45 indicated that a "bystander" like Johnson was not at risk from his low level exposure to asbestos, see Pet. at 18-19 and n.6 *supra*, petitioner could only have "warned" him of that fact and perhaps also stated that dissimilar workers experiencing direct, high level exposure over the TLV of 5 were at risk. See nn.14 & 15 *supra*. Can one logically say that such a warning would have prevented the injury at bar? *See Feldman v. Lederle Laboratories*, 97 N.J. 429, 454, 479 A.2d 374, 387 (1984) ("A warning that a product may have an unknowable danger warns one of nothing.") See also Pet. at 22 n.58.

18 See, e.g., Opp. at 3, 4, 10, 14-20.

as "essentially a well man,"[19] or that the two plaintiffs had entirely different periods of product exposure. See Pet. at 21.

Respondents repeat the point noted in the petition that the trial court instructed the jury to consider Mr. Johnson's and Mr. Higgins' claims separately,[20] but respondents do not address or refute petitioner's contention that the jury's improper application of Higgins' proofs to Johnson's claim is indisputably demonstrated by its verdict which found a similar duty to warn as to both plaintiffs, and awarded almost identical punitive damages.[21] Furthermore, the application of Higgins' proofs to Johnson's claim was especially prejudicial to Celotex which was not properly a party to *Higgins*.[22]

Respectfully submitted,

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19 See Opp. at 2 n.2. See also Pet. at 22 (regarding Higgins' death). Since space does not permit Celotex to fully address what it perceives as respondents' mischaracterization of the record regarding Mr. Johnson's medical condition, petitioner has lodged with the Court copies of relevant pages of the Second Circuit joint appendix cited by the parties. See, e.g., Jt. App. 715 and Pet. at 19 n.44 (Johnson does not have asbestosis). See, e.g., Jt. App. 677 (plaintiff's expert stating that Mr. Johnson does not have cancer); 2118 (jury instructed that "No claim is made here that there is a reasonable likelihood that Mr. Johnson will develop cancer and, accordingly, you should make no award to compensate for any pain or expense associated with that illness. . . .") [See Pet. Lodg., app. 4].

20 Opp. at 23. See also Pet. at 22 & n.57.

21 See Pet. at 22 & n.58; 23.

22 *In re Joint Eastern and Southern Districts Asbestos Litigation*, No. CV-87-0537 [*Higgins*], slip op. at 12 (S.D.N.Y. Aug. 23, 1990). See Pet. Lodg., app. 5.